

## UNITED STATES DISTRICT COURT

## DISTRICT OF NEVADA

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ANTHONY MICHAEL MARCELLI,

Case No. 3:12-cv-00211-MMD-WGC

Petitioner,

ORDER

v.

GREG COX, et al.,

Respondents.

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which petitioner, a state prisoner, is proceeding *pro se*. Before the court is respondents' motion to dismiss (dkt. no. 19). Petitioner opposed the motion (dkt. no. 35), and he also filed a motion for stay and abeyance (dkt. no. 34). Respondents have replied to both (dkt. no. s 36, 37). Petitioner has also filed a motion for reconsideration of this court's order denying counsel as well as a second motion for appointment of counsel; the court considers these first.

**I. PETITIONER'S MOTION FOR RECONSIDERATION AND SECOND MOTION FOR APPOINTMENT OF COUNSEL**

On January 29, 2013, petitioner filed a second motion for appointment of counsel (dkt. no. 31), and on February 14, 2013, petitioner filed a motion to reconsider the order denying the first motion for counsel (dkt. no. 33). As the Court explained previously, there is no constitutional right to appointed counsel for a federal habeas corpus proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999

1 F.2d 425, 428 (9<sup>th</sup> Cir.1993). The decision to appoint counsel is generally discretionary.  
 2 *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9<sup>th</sup> Cir.1986), *cert. denied*, 481 U.S. 1023  
 3 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9<sup>th</sup> Cir.), *cert. denied*, 469 U.S. 838  
 4 (1984). However, counsel must be appointed if the complexities of the case are such  
 5 that denial of counsel would amount to a denial of due process, and where the petitioner  
 6 is a person of such limited education as to be incapable of fairly presenting his claims.  
 7 See *Chaney*, 801 F.2d at 1196; see also *Hawkins v. Bennett*, 423 F.2d 948 (8<sup>th</sup>  
 8 Cir.1970).

9 With respect to reconsideration of the denial of the first motion for appointment of  
 10 counsel, where a ruling has resulted in final judgment or order, a motion for  
 11 reconsideration may be construed either as a motion to alter or amend judgment  
 12 pursuant to Federal Rule of Civil Procedure 59(e), or as a motion for relief from  
 13 judgment pursuant to Federal Rule 60(b). *School Dist. No. 1J Multnomah County v.*  
 14 *AC&S, Inc.*, 5 F.3d 1255, 1262 (9<sup>th</sup> Cir. 1993), *cert. denied* 512 U.S. 1236 (1994).

15 Under Fed. R. Civ. P. 60(b) the court may relieve a party from a final judgment or  
 16 order for the following reasons:

- 17 (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly  
 18 discovered evidence which by due diligence could not have been  
 19 discovered in time to move for a new trial under Rule 59(b); (3) fraud  
 20 (whether heretofore denominated intrinsic or extrinsic), misrepresentation,  
 21 or other misconduct of an adverse party; (4) the judgment is void; (5) the  
 judgment has been satisfied, released, or discharged, or a prior judgment  
 upon which it is based has been reversed or otherwise vacated, or it is no  
 longer equitable that the judgment should have prospective application; or  
 (6) any other reason justifying relief from the operation of the judgment.

22 Motions to reconsider are generally left to the discretion of the trial court. See *Combs v.*  
 23 *Nick Garin Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987). In order to succeed on a  
 24 motion to reconsider, a party must set forth facts or law of a strongly convincing nature  
 25 to induce the court to reverse its prior decision. See *Kern-Tulare Water Dist. v. City of*  
 26 *Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part on*  
 27 *other grounds* 828 F.2d 514 (9<sup>th</sup> Cir. 1987). Rule 59(e) of the Federal Rules of Civil  
 28 Procedure provides that any "motion to alter or amend a judgment shall be filed no later

1 than 28 days after entry of the judgment.” Furthermore, a motion under Fed. R. Civ. P.  
2 59(e) “should not be granted, absent highly unusual circumstances, unless the district  
3 court is presented with newly discovered evidence, committed clear error, or if there is  
4 an intervening change in the controlling law.” *Herbst v. Cook*, 260 F.3d 1039, 1044 (9<sup>th</sup>  
5 Cir. 2001), *quoting McDowell v. Calderon*, 197 F.3d 1253, 1255 (9<sup>th</sup> Cir. 1999).

6 In its order of January 28, 2013, the Court denied petitioner’s first motion for  
7 appointment of counsel, finding that the petition in this case was sufficiently clear in  
8 presenting the issues petitioner wishes to raise (dkt. no. 29). In his motion for  
9 reconsideration, petitioner alleges that prison officials have taken some of his legal work  
10 from him, including his copy of this petition and his copy of the motion to dismiss (dkt.  
11 no. 33 at 3-4). The Court also notes that petitioner submitted a letter claiming that he is  
12 being refused legal supplies, including carbon copy paper (dkt. no. 38-1 at 2). He also  
13 attaches correspondence dated March 6, 2013, that appears to be from the Northern  
14 Nevada Correctional Center (“NNCC”) law library supervisor (dkt. no. 38-1 at 4). The  
15 letter reflects that NNCC’s Dr. Gedney had written to the law library indicating that  
16 petitioner needed law librarian assistance “because of [his] medical condition.” The  
17 letter then states, “Since you indicated you do not want our assistance, we are  
18 withdrawing from your case and notifying Dr. Gedney as such.”

19 The allegations that prison personnel are interfering with and hampering  
20 petitioner’s ability to litigate this action and/or that the law library has refused to assist  
21 petitioner – especially if he needs particular assistance due to a medical condition – are  
22 of grave concern to the Court.<sup>1</sup> However, as will be discussed below, this petition must  
23 be dismissed because petitioner has failed to exhaust available state remedies for any  
24 of the claims raised. Accordingly, petitioner’s due process rights are not implicated as  
25 there is no possibility of success on the merits, and the appointment of counsel would

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27 <sup>1</sup>The Court notes that the letter from the law library supervisor indicates that  
28 petitioner refused legal assistance; of course petitioner cannot refuse such assistance  
and then be heard to complain that he was denied it.

1 be futile. See *Chaney*, 801 F.2d at 1196. Thus, both petitioner's motion to reconsider  
 2 the order denying appointment of counsel (dkt. no. 33) and the second motion for  
 3 appointment of counsel (dkt. no. 31) must be denied.

## 4 **II. PROCEDURAL HISTORY AND BACKGROUND**

5 On May 25, 2011, petitioner was convicted, pursuant to a no-contest plea under  
 6 *Alford v. North Carolina*, of attempting to commit the crime of making threats or  
 7 conveying false information concerning acts of terrorism, weapons of mass destruction,  
 8 lethal agents, or toxins (exhibits to motion to dismiss, dkt. no. 19, ex. 20).<sup>2</sup> Petitioner  
 9 was sentenced to a term of 48 to 120 months in the Nevada Department of Corrections  
 10 (*id.*).

11 Petitioner appealed, and the Nevada Supreme Court affirmed his conviction on  
 12 March 7, 2012 (ex. 37).

13 Petitioner dispatched this federal petition for writ of habeas corpus on April 16,  
 14 2012 (dkt. no. 1-1), and submitted an amended petition on June 27, 2012 (dkt. no. 11).  
 15 Respondents argue that the petition must be dismissed as unexhausted.

## 16 **III. DISCUSSION**

### 17 **A. Legal Standard for Exhaustion**

18 A federal court will not grant a state prisoner's petition for habeas relief until the  
 19 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*  
 20 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state  
 21 courts a fair opportunity to act on each of his claims before he presents those claims in  
 22 a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also  
 23 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the  
 24 petitioner has given the highest available state court the opportunity to consider the  
 25 claim through direct appeal or state collateral review proceedings. See *Casey v. Moore*,  
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27 <sup>2</sup>All exhibits referenced in this order are exhibits to respondents' motion to  
 28 dismiss (dkt. no. 19) and may be found at dkt. no. s 20 and 21.

1 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir.  
2 1981).

3 A habeas petitioner must “present the state courts with the same claim he urges  
4 upon the federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal  
5 constitutional implications of a claim, not just issues of state law, must have been raised  
6 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481  
7 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276). To achieve exhaustion, the state court  
8 must be “alerted to the fact that the prisoner [is] asserting claims under the United  
9 States Constitution” and given the opportunity to correct alleged violations of the  
10 prisoner’s federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see *Hiivala v.*  
11 *Wood*, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir. 1999). It is well settled that 28 U.S.C. § 2254(b)  
12 “provides a simple and clear instruction to potential litigants: before you bring any claims  
13 to federal court, be sure that you first have taken each one to state court.” *Jiminez v.*  
14 *Rice*, 276 F.3d 478, 481 (9<sup>th</sup> Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 520  
15 (1982)). “[G]eneral appeals to broad constitutional principles, such as due process,  
16 equal protection, and the right to a fair trial, are insufficient to establish exhaustion.”  
17 *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir. 1999) (citations omitted). However,  
18 citation to state caselaw that applies federal constitutional principles will suffice.  
19 *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9<sup>th</sup> Cir. 2003) (en banc).

20 A claim is not exhausted unless the petitioner has presented to the state court  
21 the same operative facts and legal theory upon which his federal habeas claim is based.  
22 *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1473 (9<sup>th</sup> Cir. 1994). The  
23 exhaustion requirement is not met when the petitioner presents to the federal court facts  
24 or evidence which place the claim in a significantly different posture than it was in the  
25 state courts, or where different facts are presented at the federal level to support the  
26 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9<sup>th</sup> Cir. 1988); *Pappageorge v.*  
27 *Sumner*, 688 F.2d 1294, 1295 (9<sup>th</sup> Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455, 458  
28 (D. Nev. 1984).

1           **B.      Instant Petition**

2           Respondents point out that petitioner has presented only one claim to the  
3 Nevada Supreme Court: his claim on direct appeal that the trial court abused its  
4 discretion when it refused to find petitioner guilty but mentally ill (dkt. no. 19 at 3; ex.'s  
5 27A at 7-8; 36 at 4-5; 37). The claim has not been raised in petitioner's federal habeas  
6 petition (see dkt. no. 11). Accordingly, respondents are correct that the ten grounds in  
7 his federal habeas petition are unexhausted.

8           While this Court has discretion to hold a "mixed" petition – a petition containing  
9 both exhausted and unexhausted claims – in abeyance, *Rhines v. Weber*, 544 U.S. 269  
10 (2005), it must dismiss a petition that contains only unexhausted claims. *Rasberry v.*  
11 *Garcia*, 448 F.3d 1150, 1154 (9<sup>th</sup> Cir. 2006). Therefore, this petition must be dismissed  
12 without prejudice to petitioner filing a new petition after exhaustion of available state  
13 remedies. However, petitioner is advised to familiarize himself with the limitations  
14 periods for filing federal habeas petitions contained in 28 U.S.C. § 2244(d). Finally,  
15 petitioner's motion for stay and abeyance (dkt. no. 34) must be denied.

16           **IV.     CERTIFICATE OF APPEALABILITY**

17           In order to proceed with an appeal, petitioner must receive a certificate of  
18 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup> Cir. R. 22-1; *Allen v.*  
19 *Ornoski*, 435 F.3d 946, 950-951 (9<sup>th</sup> Cir. 2006); see also *United States v. Mikels*, 236  
20 F.3d 550, 551-52 (9<sup>th</sup> Cir. 2001). Generally, a petitioner must make "a substantial  
21 showing of the denial of a constitutional right" to warrant a certificate of appealability.  
22 *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The  
23 petitioner must demonstrate that reasonable jurists would find the district court's  
24 assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529  
25 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of  
26 demonstrating that the issues are debatable among jurists of reason; that a court could  
27 resolve the issues differently; or that the questions are adequate to deserve  
28 encouragement to proceed further. *Id.* Here, jurists of reason would not find the Court's

1 dismissal of this action without prejudice to be debatable or incorrect. The Court will  
2 therefore deny petitioner a certificate of appealability.

3 **V. CONCLUSION**

4 IT IS THEREFORE ORDERED that respondents' motion to dismiss the petition  
5 (dkt. no. 19) is GRANTED.


6 IT IS FURTHER ORDERED that the petition is DISMISSED without prejudice.

7 IT IS FURTHER ORDERED that petitioner is DENIED A CERTIFICATE OF  
8 APPEALABILITY.

9 IT IS FURTHER ORDERED that the following motions filed by petitioner: motion  
10 for appointment of counsel (dkt. no. 31); motion for district judge to reconsider order  
11 (dkt. no. 33); and motion for stay and abeyance (dkt. no. 34) are all DENIED.

12 IT IS FURTHER ORDERED that the Clerk SHALL ENTER JUDGMENT  
13 accordingly and close this case.

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15 DATED THIS 22<sup>nd</sup> day of 2013.

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19 MIRANDA M. DU  
20 UNITED STATES DISTRICT JUDGE  
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